2012 IL App (3d) 120286-U

Order filed August 28, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

IN RE MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit
SHERRI L. BONNETTE,	)	Tazewell County, Illinois,
	)	
Petitioner-Appellee,	)	
	)	Appeal No. 3-12-0286
v.	)	Circuit No. 02 D 651
	)	
EUGENE BONNETTE,	)	The Honorable
	)	Jerelyn D. Maher,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Wright and Carter concurred in the judgment.

ORDER

¶ 1 Held: The circuit court's order denying respondent's petition to modify child custody was not contrary to the manifest weight of the evidence where the record failed to establish that there has been a substantial change of circumstances since the entry of the judgment of dissolution that would necessitate a change of custody from petitioner to respondent.

¶ 2 Respondent argues that the circuit court's order denying his petition to modify child

custody was contrary to the manifest weight of the evidence. For the following reasons, we disagree and affirm the court's judgment.

¶ 3 FACTS

¶ 4 On May 12, 2003, a judgment of dissolution (the judgment) of the parties' marriage was entered in the circuit court of Tazewell County. The judgment awarded petitioner sole custody of the parties' three minor children: Ayden, born December 16, 1997, Aspen, born February 9, 2000, and Landen, born February 9, 2000 (the children).

¶ 5 On August 30, 2011, respondent filed an amended petition to modify custody. On the recommendation of the guardian ad litem (the GAL), the court granted respondent temporary custody of Ayden. The following evidence was adduced at the custody hearing.

¶ 6 Petitioner married Matt Miller on April 19, 2009. One child, Irulan, was born as a result of the marriage. Petitioner, her three children, Matt and Irulan all lived together. Petitioner is employed as a sales manager and Matt is a self-employed attorney. Petitioner testified the children have age appropriate clothing, receive healthcare as needed, have a normal hygiene routine and receive proper nutrition. Both petitioner and Matt are actively involved in the children's education and extracurricular activities. Petitioner believes Matt is committed to the children's well-being. According to petitioner, Matt has never hit or threatened the children. Matt testified that he had a good relationship with the children until respondent filed his petition to modify custody.

¶ 7 The children testified that they preferred to live with respondent. They alleged several incidents of physical abuse and stated that petitioner would call them derogatory names and lie to them. Landen testified that Matt threatened to kill him. Landen and Ayden both stated that they

had nothing good to say about their mother. Landen told respondent that he wanted to harm himself because he was tired of being abused by petitioner. Aspen testified that she does not love petitioner. The children all stated they enjoy spending time with respondent and feel safe in his presence

¶ 8 Respondent testified that the children do well when they are in his care. They follow his rules and complete their chores and he believes the children are happier living with him than with petitioner. They interact well with one another and do not destroy anything in his house. Respondent is actively involved in the children's educational and extracurricular activities.

¶ 9 In 2010, Ayden and Landen began a campaign to get "kicked out of the house." Ayden wrote a school essay entitled, "All About Me," in which he recited that it was his goal to get kicked out of petitioner's house and go live with respondent.

¶ 10 On May 27, 2010, in an act of vandalism, the words "Fuck You" were scratched into the side of petitioner's vehicle. Landen and Ayden admitted to causing the damage, claiming petitioner had lied to them and had told Ayden that she hated him. The children also vandalized the interior of petitioner's home. Specifically, they poured bleach on the carpet, wrote on the dryer with a marker, wrote their names on the wall, slit a hole in one of the couch cushions and dumped DVDs and paperwork all over the floor.

¶ 11 In acts of defiance, Landen exposed his penis to petitioner and Ayden exposed his buttocks. Ayden admitted that he urinated in Matt's ice tea, only informing Matt of his action after he had finished drinking it.

¶ 12 In October 2010, Ayden told school officials that petitioner had abused him by beating him with a belt. Petitioner denied this claim. Ayden gave several contradictory stories to school

personnel and the Department of Children and Family Services (DCFS) investigators. Ultimately, Ayden denied that petitioner had abused him. DCFS concluded that Ayden's initial claim of abuse was unfounded.

¶ 13 In December 2010, Landen put scratch marks all over Matt's vehicle. Petitioner and Matt yelled at Landen due to his behavior. In June 2011, Landen pled guilty to setting fire to Matt's vehicle. He was placed on probation for a period of one year. Matt had cameras installed at the home to monitor the children's behavior and expressed concern for the safety of his daughter, Irulan, due to the criminal behavior of Ayden and Landen.

¶ 14 Petitioner attempted to deal with the above-described conduct when it occurred. However, she would call the police when Ayden and Landen would not calm down and she was unable to control the situation. The police advised Ayden and Landen that causing damage to property would not improve their chances of moving elsewhere.

¶ 15 Petitioner and the children were involved in counseling. The counselor opined that the children were acting out against Matt because they wanted petitioner all to themselves. The counselor also noted that the children exhibited a great deal of anger towards petitioner and that they began to call petitioner by her first name, Sherri.

¶ 16 Respondent informed the counselor that Aspen had allegedly been touched by petitioner's nephew, Quentin Reed. The counselor testified that she asked Aspen in counseling about this alleged incident and the girl replied that she did not remember any such incident occurring. Based on that response, the counselor believed there was no reason to pursue the matter further.

¶ 17 The GAL opined that petitioner should retain sole custody of the children. In regard to her previous recommendation that respondent be awarded temporary custody of Ayden she

stated:

> "Yes, when I made the recommendation that Ayden be temporarily transferred to respondent, I did it really out of concern for him and the other children in the home including Mr. & Mrs. Miller's child. The destruction that he had caused at this Mother's house was really concerning to me. I was afraid that he would destroy more property, hurt himself, Mr. & Mrs. Miller, his brother and sisters and then Landen comes by and starts on his campaign of destruction which was actually worse than anything that Ayden had come up with. The burning of a car that could have resulted in the house burning down, resulted in all their deaths, did result in a Juvenile Court record for him. It's got me thinking to what my previous statement was to the Court at the beginning of this case is that you cannot reward bad behavior, and that's what these children are doing. They want a reward for their bad behavior. Transferring custody of them to Mr. Bonnette would do that, would reward them for this bad behavior and I think that would be a terrible life lesson for them."

¶ 18 Upon hearing argument, the circuit court denied respondent's motion to modify custody, finding that the children's claims of abuse were not credible. Instead, the court found that their behavior and claims of abuse were acts in furtherance of the goal of getting kicked out of petitioner's home. Specifically, the court stated:

"In conclusion, the change in circumstances in this case were that these children embarked upon a plan to effectuate a Petition for Change of Custody. The problems that this mother has had with these children [is] not a basis for a change of custody

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I've listened to children on the stand in juvenile court and in family court. The, and it was, robotic character that I witnessed, it's chilling even to a seasoned judge as I am. These children, are they lying? Unfortunately, I don't know if they know the difference between a lie and words and acts they're supposed to do that would get them what they want for what reason. It's the father's burden because if you strip away the drama – the mother's done what she could under the circumstances."

¶ 19 ANALYSIS

¶ 20 Respondent argues that the trial court's order denying his petition to modify child custody was contrary to the manifest weight of the evidence. Upon review, we find respondent fails to establish that there has been a substantial change of circumstances since the entry of the judgment of dissolution that would necessitate a change of custody from petitioner to respondent. We also find respondent failed to overcome the presumption in favor of petitioner, the present custodian, that custody not be changed. *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 410 (1994).

¶ 21 Section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act)

(750 ILCS 5/610(b) (West 2010)) governs the modification of child custody. It provides as follows:

> "The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint[-]custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, *and that the modification is necessary to serve the best interest of the child*. *** The court shall state in its decision specific findings of fact in support of its modification or termination of joint custody if either parent opposes the modification or termination." (Emphasis added.)

¶ 22 The trial court found respondent had failed to present clear and convincing evidence that there had been a substantial change in circumstances that necessitated a change of custody. We review the court's judgment pursuant to the following standards.

> "The trial court should consider all relevant factors, including those listed in section 602 of the Dissolution Act [(750 ILCS 5/602 (West 2010))], when making child[-]custody determinations and decide what custodial order serves the child's best interest. [Citation.] A custody determination inevitably rests

> on the parties' temperaments, personalities, and capabilities, and the witnesses' demeanor. [Citation.] Because the trial court is in a far better position to 'observe the temperaments and personalities of the parties and assess the credibility of the witnesses,' the reviewing court affords great deference to the trial court's best interests findings. [Citation.] We acknowledge that stability and continuity are major considerations in custody decisions, so that a presumption exists in favor of the present custodian. [Citation.] However, once a trial court has determined that the presumption in favor of the present custodian has been overcome, we are not to disturb that determination unless it is against the manifest weight of the evidence, is manifestly unjust, or results from a clear abuse of discretion. [Citation.]" *In re Marriage of Spent*, 342 Ill. App. 3d 643, 652 (2003).

¶ 23 We also give weight to the fact that the trial court had the opportunity to see and hear all of the witnesses presented at trial and was able to make credibility determinations of the witnesses. *Szensy v. Szensy*, 197 Ill. App. 3d 966, 973 (1990).

¶ 24 Initially, respondent calls our attention to the fact that the children preferred to live with him and not with petitioner. The circuit court correctly found, however, that a child's preference, while entitled to consideration, is not dispositive in a custody determination. *Cooper v. Cooper*, 146 Ill. App. 3d 943, 951 (1986). A change in the child's preferred living situation does not alone constitute a substantial change in circumstances. *Cooper*, 146 Ill. App. 3d at 951.

¶ 25 Respondent also cites the children's testimony of alleged mental and physical abuse on the part of petitioner. The court, however, expressly found the children's testimony to lack credibility. The record is devoid of any evidence refuting this factual finding. Thus, we defer to the court's finding on this matter. See *Szensy*, 197 Ill. App. 3d at 973.

¶ 26 Each party directs our attention to instances of what he or she feels is improper conduct on the part of the other spouse. Needless to say, no parent is perfect. While the court found that the respondent had a strong relationship with the children, it determined that it was an abnormal relationship as evidenced by the demeanor and testimony of the respondent and the children in court. Because the court had the opportunity to observe the witnesses' demeanor and testimony we defer to this finding. Moreover, the court found that the children's needs are being met by petitioner. While the court acknowledged that petitioner had remarried and the children were clearly acting out, the court found that the children's actions were merely a ploy to effectuate a change in custody.

¶ 27 The record supports the court's finding that the children were acting out in an attempt to get kicked out of petitioner's house. Their behavior clearly changed the circumstances under which the members of the household were living, and did so in a very substantial and negative way. However, like the circuit court, we do not believe that the children's malicious and manipulative conduct constitutes the type of substantial change in circumstances that the legislature intended would necessitate a change of custody from petitioner to respondent. Moreover, we agree with the trial court's refusal to reward the children for such devious and spiteful behavior. As recited above, section 610(b) of the Dissolution Act (750 ILCS 5/610(b) (West 2010) allows modification only when "the modification is necessary to serve the best

interest of the child." The children's GAL opined that they were engaged in bad behavior and "[t]hey want a reward for their bad behavior. Transferring custody of them to Mr. Bonnette would do that, would reward them for this bad behavior and I think that would be a terrible life lesson for them." The trial court appeared to agree, stating "if you strip away the drama – the mother's done what she could under the circumstances."

¶ 28 Petitioner attempted to discipline the children. She attended counseling sessions with the children, instituted a plan to improve Landen's and Aspen's performance in school, distributed reasonable punishments and even called the police when she felt unable to control the situation. The record is devoid of any *credible* evidence that petitioner was not meeting the children's emotional, physical, educational and medical needs. We also emphasize that the GAL recommended that petitioner retain custody of the children. Respondent has simply failed to overcome the presumption in favor of petitioner as the present custodian. Again, the court expressly stated: "It's the father's burden because if you strip away the drama – the mother's done what she could under the circumstances."

¶ 29 Despite the children's preference to live with respondent and their behavior while living with petitioner and our recognition that, although petitioner is fighting to retain custody, life would probably be calmer and more pleasant for her, her husband, and Irulan if the older boys were to live with respondent, we must affirm the trial court's judgment given (1) our review of the facts of this case in their entirety, (2) the great deference afforded to the court's findings and decision, (3) the GAL's recommendation, (4) the presumption in favor of petitioner, and (5) the requirement of the statute that any modification of custody be in the best interest of the children. In sum, the circuit court's holding that respondent failed to prove by clear and convincing

evidence that there has been a substantial change of circumstances since the entry of the judgment of dissolution that would necessitate a change of custody from petitioner to respondent was not against the manifest weight of the evidence. Therefore, we affirm the court's judgment.

¶ 30 Affirmed.